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Materials for

LAW AND MULTICULTURALISM

Fall 2014

Perspectives/ICT/SUYRP course

VOLUME II

Professor Ayelet Shachar
Faculty of Law
University of Toronto

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Evaluation

Regular class attendance (10%), substantive participation in weekly discussions (20%), and a twenty-four hour take-home examination (70%) which may be signed-out between 9:00 a.m. to 4:00 p.m. for a 24 hour period during the examination period, Monday to Friday, excluding weekends to the Faculty's deadline for first term written work.

VOLUME ONE

I. FOUNDATIONS

1 Introduction

Objectives and design of the course.

Canadian Charter of Rights and Freedoms, s 27, *Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 1

Canadian Multiculturalism Act, R.S.C. 1985, c. 24 (4th Supp.) 2

Bill 60, *Charter affirming the values of State secularism and religious neutrality and of equality between women and men and providing a framework for accommodation requests*, 1st Sess, 40th Leg., Québec, National Assembly, 2013.....12

Erazo v Dufferin-Peel Catholic District School Board 2014 ONSC 2072 19

Caroline Alphonso, "Board won't appeal ruling exempting Catholic students from mass," *The Globe and Mail*, April 23, 2014 31

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Santa Clara Pueblo et al v Martinez et al, 436 US 49 (1978).....33

Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, 1995) 10-44 40

Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge: Cambridge University Press, 2001) 17-44 59

Martha Minow, "Identities" 3 *Yale Journal of Law & the Humanities* 97 (1991) 75

II. ILLUSTRATIONS: CONTESTED SOCIAL AND LEGAL ARENAS

3 Citizenship and the Boundaries of Religious Accommodation in the Public Sphere - Canada, France, and Beyond

Ayelet Shachar, "Interpretation Sections (27 and 28) of the Canadian Charter" in *Canadian Charter of Rights and Freedoms,* eds., Errol Mendes and Stephane Beaulac (5th ed., LexisNexis, Canada, 2013), pp. 147-164 109

Rogers Brubaker, "Citizenship as Social Closure," in *Citizenship and Nationhood in France and Germany* (Harvard University Press, 1992) 21-34 119

"France/Secularism," *Statement made by President Jacques Chirac*, France, 28 January 28 2004 135

Ayelet Shachar, "Religion, State, and the Problem of Gender: New Modes of Citizenship and Governance in Diverse Societies," 50 *McGill Law Journal* 49 (2005) 136

Patrick Weil, "A nation in diversity: France, Muslims and the headscarf" *Open Democracy* (25 March 2004) 147

John Bowen, "How the French State Justifies Controlling Muslim Bodies: From Harm-Based to Value-Based Reasoning" 78 *Social Research* 325 (2011) 153

Multani v Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6, [2006] 1 SCR 256 177

Note on *Goldman v Weinberger*, 475 US 503 (1986) in Geoffrey R Stone et al, *Constitutional Law*, 4th ed. (Aspen Law & Business, 2001) 1473-1474 194

Micah Schwartzman, Richard Schragger and Nelson Tebbe, "The New Law of Religion," *Slate.com* (July 3, 2014) 197

Anna Su, "The Good News According to *Hobby Lobby*" *Religion & Politics* (July 2, 2014) 200

4 The Retreat from Multiculturalism?

Citizenship and Immigration Canada, "Discover Canada: The Rights and Responsibilities of Citizenship" *Citizenship and Immigration Canada* (2010) 204

"Canadian History a Strong Point with Newcomers," *CBC News*, December 27, 2011 211

Liav Orgad, "Illiberal Liberalism: Cultural Restrictions on Migration and Access to Citizenship in Europe" 58 *American Journal of Comparative Law* 53 (2010) 212

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 236

R v N.S., 2012 SCC 72 240

Pascale Fournier and Erica See, "The 'Naked Face' of Secular Exclusion: Bill 94 and the Privatization of Belief," 30 *Windsor Yearbook of Access to Justice* 63 (2012) 253

Ayelet Shachar, "Interpretation Sections (27 and 28) of the Canadian Charter" in *Canadian Charter of Rights and Freedoms*, eds., Errol Mendes and Stephane Beaulac (5th ed., LexisNexis, Canada, 2013), pp. 165-178 255

Christopher McCrudden, "Multiculturalism, Freedom of Religion and the British Constitution: The *JFS Case* Considered" 9 *International Journal of Constitutional Law* 200 (2011) 263

5 Community, Education and Diversity

Avishai Margalit & Moshe Halbertal, "Liberalism and the Right to Culture" 71 *Social Research* 529 (2004) 293

Wisconsin v Yoder, 406 US 205 (1972) 294

William A. Galston, "Two Conceptions of Liberalism" 105 Ethics 516 (1995) 297

"Accommodations for Religious Observances" (2012), online: University of Toronto <http://www.viceprovoststudents.utoronto.ca/publicationsandpolicies/guidelines/religiousobservances.htm> 316

Vanessa MacDonnell, "Developments in Constitutional Law: The 2011-2012 Term" *Supreme Court Law Review* 2d 51, 86-90 (2012) 318

Christopher Hunter, "The Positive Role for Government in Freedom of Religion," *The Court*, Feb 28, 2012 323

"A Momentous Case for Religious Freedom in Education" Loyola High School's Case) *R v Jones* [1986] 2 SCR 284.....327

Paolo Ronchi, "Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in *Lautsi v Italy*" 13 *Ecclesiastical Law Journal* 287 (2011) 338

Lorenzo Zucca, "*Lautsi:* A Commentary on a decision by the ECtHR Grand Chamber" 11 *International Journal of Constitutional Law* 218 (2013) 349

Lautsi v Italy [GC], No 30814/06, [2011] ECHR 361

S M Corbett, "*Adler v Ontario* – The Troubling Legacy of A Compromise" 8 *Constitutional Forum* 64 (1997) 364

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6 Where Do Children Belong? Custody and Visitation; "Identity" Matters

Linda J Lacey, "Liberal Thought and Religion in Custody and Visitation Cases," in Stephen M Feldman, ed., *Law and Religion: A Critical Anthology* (New York: NYU Press, 2000) 411 1

Kimberly Van De Perre v Theodore Edwards [2001] 2 SCR 1014 10

The Indian Child Welfare Act of 1978 [United States] 34

Mississippi Band of Choctaw Indians v Holyfield, 409 US 30 (1989) 38

Ayelet Shachar, "Demystifying Culture" 10 *International Journal of Constitutional Law* 429 (2012) 41

Bethany R Berger, "In the Name of the Child: Race, Gender and Economics In *Adoptive Couple v Baby Girl*" *Florida Law Review* (2014, Forthcoming) 51

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Zenon M Bodnaruk et al, "Meeting the Clinical Challenge of Care for Jehovah's Witnesses" 18 *Transfusion Medicine Reviews* 105 (2004) 121

Rick Pedersen, "Don't Force Transfusions, Court Told", *National Post* (25 August 2003) A7 131

Alberta (Director of Child Welfare) v H (B) [2002] Alta D 360.25.70.20-02 132

Jenny Percival & Paul Lewis, "Teenager who won right to die: 'I have had too much trauma'", *The Guardian* (11 November 2008) 145

Don Ellis, "We told her we loved her", *The Guardian* (12 November 2008) 147

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David L. Chambers, "Civilizing the Natives: Marriage in Post-Apartheid South Africa" 129 *Daedalus* 101 (2000) 149

Reference re Section 293 of the Criminal Code of Canada, 2011 BCSC 1588 173

Marie-Aimee Helie-Lucas, "The Preferential Symbol for Islamic Identity: Women in Muslim Personal Laws," in Valentine M Moghadam, ed., *Identity Politics and Women* (Westview Press, 1994) 391 176

Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge University Press, 2001) 45-62 187

Mohd Ahmed Khan v Shah Bano Begum, AIR 1985 SC 945 [India] 193

Samia Bano, "Muslim and South Asian Women: Customary Law and Citizenship in Britain," in Nira Yuval-Davis and Pnina Werbner, eds., *Women, Citizenship, and Difference* (Zed Books, 1999) 162-177 205

"Darul-Qada: Beginnings of Muslim Civil Justice System in Canada" *The Canadian Society of Muslims* (April 2003) 214

Arbitration Act, SO C 1991, c 17 ss.6, 17-20 217

"Position Statement on the Proposed Implementation of Sections of Muslim Law [Sharia] in Canada" *Canadian Council of Muslim Women* (25 May 2004) 220

Marion Boyd, "Religiously-Based Alternative Dispute Resolution: A Challenge to Multiculturalism"(2006) *Canadian Diversity* 227

Ministry of the Attorney General, *Backgrounder: The Family Statute Law Amendment Act, 2005* (15 November 2005) 232

Family Arbitration, O Reg 134/07 234

David Pearl & Werner Menski, "Informal Muslim Dispute Settlement Processes," in *Muslim Family Law* (Sweet and Maxwell, 1998), 77-80 238

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Daood Hamdani, "Can Women Change the Face of North American Mosques?" *CGNews* (20 July 2012) 246

Ayelet Shachar, "Feminism and Multiculturalism: Mapping the Terrain," in David Owen & Anthony Laden, eds., *Multiculturalism and Political Theory* (Cambridge University Press, 2007) 130-136 248

Bruker v Marcovitz [2007] 3 SCR 607 253

Ran Hirschl, "Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales" 82 *Texas Law Review* 1819 (2014) 281

Howard Kislowicz, "Judging the Rules of Belonging," 44 *UBC Law Review* 287 (2011) 296

10 International Law, Norm Diffusion, and the Recognition/Regulation of Diversity

Lovelace v. Canada UN GOAR, 36th Sess., Supp. No. 40, UN Doc. A/36/40 (1981) 333

Steven Vertovec, "'Diversity' and the Social Imaginary" 53 *European Journal of Sociology* 287 (2012) 342

Zachary Elkins, Tom Ginsburg & Beth Simmons, "Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice" 54 *Harvard International Law Journal* 61 (2013) 362

Galit Sarfaty, "International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation" 48 *Harvard International Law Journal* 441 (2008) 370

Epilogue

Salman Rushdie, "Good Advice is Rarer than Rubies" in *East, West: Stories* (Vintage International, 1994), 5-16 392